SUPREME COURT, U.S.
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No. 09-1510

In The

Supreme Court of the United States

ALEX M. GRIJALVA,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court below erred in affirming the Merit Systems Protection Board's (hereinafter the "Board") denial of Petitioner's petition for review of the decision issued by the administrative judge to dismiss Petitioner's appeal of a decision by the Department of Homeland Security, (hereinafter the "Agency") based on untimely filing of Petitioner's appeal to the administrative judge.

2. Whether the court below erred in affirming the Board's denial of Petitioner's petition for review of the decision issued by the administrative judge based on procedural issues only, instead of on the merits of the case.

3. Whether the court below denied Petitioner his right to due process under the provisions of the Fifth Amendment to the U.S. Constitution.

PARTIES TO THE PROCEEDING

ALEX M. GRIJALVA – Petitioner
MERIT SYSTEMS PROTECTION BOARD - Respondent
United States Court of Appeals for the Federal Circuit

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 2
STATUTES AND CONSTITUTIONAL PROVISIONS 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 5
A. Board Policy Considerations Counsel Against Dismissals For Untimely Filing And Militate For Providing Employees With A Hearing On The Merits Of Their Appeals 5
B. If The Employee Gives A Reasonable Excuse For The Delay, Such Excuse Should Be Accepted By The Presiding Official, Absent A Showing Of Substantial Prejudice To The Agency Caused By The Delay In Filing 6
C. Any Doubt About Whether Good Cause Has Been Shown Should Be Resolved In Favor Of An Appellant. Good Cause Is An Elastic Concept [Which] Entitles The Employee To The Application Of The Broad Equitable Principles Of Justice And Good Conscience 8
D. The United States Court Of Appeals For The Federal Circuit Has Failed To Follow Its Own Precedents, Resulting In An Unjust Dismissal Of An Appeal On Procedural Grounds, Depriving Plaintiff Of His Fifth Amendment Right To Due Process. 11
CONCLUSION 12
APPENDIX A-13

TABLE OF AUTHORITIES

Cases **Page**

Adams v. State, 123 P.3d 400, 2005 UT 62 10

Ceja v. United States, 710 F.2d 812 (Fed. Cir. 06/27/1983) 8

Pfaehler v. Merit Systems Protection Board, 783 F.2d 187 (Fed. Cir. 02/10/1986) 8

Phillips v. United States Postal Service, 695 F.2d 1389 (Fed. Cir. 12/23/1982) 9

Walls v. Merit Systems Protection Bd., 29 F.3d 1578 (Fed. Cir. 07/26/1994) 5, 6, 7

Young v. Department of Commerce, 737 F.2d 1029 (Fed. Cir. 06/28/1984) 10

Yuni v. Merit Systems Protection Board, 784 F.2d 381 (Fed. Cir. 02/19/1986) 9

Constitutional Provisions

U.S. Constitution, Fifth Amendment 3

Statutes

Code of Federal Regulations, 5 C.F.R. §1201. 115(d) 3

Code of Federal Regulations, 5 C.F.R. §1201. 22(b)(1) 2

Code of Federal Regulations, 5 C.F.R. §1201. 56(a)(2)(ii) 2

Code of Federal Regulations, 5 C.F.R. §1201.12 2

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---

PETITION FOR A WRIT OF CERTIORARI

Petitioner requests that a writ of certiorari issue to review the final order of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Merit Systems Protection Board is unpublished and reproduced in the Appendix at A-27. The United States Court of Appeals for the Federal Circuit order affirming the Merit Systems Protection Board's opinion is unpublished and reproduced in the Appendix at A-14.

JURISDICTION

On June 19, 2007, the Agency issued a notice of decision removing Petitioner for cause from his position a maintenance mechanic. Petitioner appealed. On November 26, 2007, the administrative judge dismissed Petitioner's appeal as untimely filed. On March 21, 2008, the Board denied Petitioner's petition for review. On January 12, 2009, the United States Court of Appeals for the Federal Circuit affirmed the Board's denial.

STATUTES AND CONSTITUTIONAL PROVISIONS

Federal Statutes

The *Code of Federal Regulations, 5 C.F.R. §1201.12* states in pertinent part:

> "The Board may revoke, amend, or waive any of these regulations. A judge may, for good cause shown, waive a Board regulation unless a statute requires application of the regulation."

The *Code of Federal Regulations, 5 C.F.R. §1201.22(b)(1)* states in pertinent part:

> "...an appeal must be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of receipt of the agency's decision, whichever is later."

The *Code of Federal Regulations, 5 C.F.R. §1201.56(a)(2)(ii)* states in pertinent part:

> "The appellant has the burden of proof, by a preponderance of the evidence, with respect to...The timeliness of the appeal..."

The *Code of Federal Regulations, 5 C.F.R. §1201.113(b)* states in pertinent part:

"If the Board denies all petitions for review, the initial decision will become final when the Board issues its last decision denying a petition for review."

The *Code of Federal Regulations, 5 C.F.R. §1201. 115(d)* states in pertinent part:

"The Board...may grant a petition for review when it is established that...New and material evidence is available that, despite due diligence, was not available when the record closed..."

U.S. Constitution

The *U.S. Constitution, Fifth Amendment* states in pertinent part :

"No person shall...be deprived of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

On June 13, 2007, the Agency issued a letter of decision removing the Petitioner, Alex M. Grijalva, for cause from his position as a Maintenance Mechanic (App. A-69). On September 11, 2007, 48 days after the statutory deadline for filing an appeal, the Petitioner filed his appeal of that decision to the Board without benefit of counsel (App. A-40; A-41). His appeal was reviewed by Administrative Judge LuNell C. Anderson.

Petitioner filed his original appeal with the Agency *pro se* (App. A-40; A-41). He was simultaneously involved with a criminal action directly related to, and consequent to, his being removed for cause by the Agency (App. A-69; A-81). He believed – incorrectly – that the thirty-day time to file his appeal commenced with the Federal Prosecutor's decision on whether he would be charged with a felony or a misdemeanor

(App. A-44), and consequently filed his original appeal within 30 days of the prosecutor's decision, but 48 days after the date of receipt of the agency's decision. This constituted an inadvertent violation of the procedural rules.

Because it appeared that the Petitioner's petition for appeal was untimely filed, Judge Anderson issued an acknowledgment order on September 17, 2007, advising the Petitioner of the Board's filing requirements and ordering him to respond within 10 days with evidence and/or argument showing that his appeal was timely filed or that good cause existed for the delay (App. A-30).

On September 21, .2007, the Petitioner responded to the acknowledgment order, again without benefit of counsel, but failed to address definitively the pertinent issues raised by Judge Anderson (App. A-44).

Subsequently, on November 26, 2007, Judge Anderson dismissed Petitioner's Appeal on procedural grounds as untimely filed (App. A-19).

On December 28, 2007, Petitioner filed a Petition for Review of Judge Anderson's decision, this time through the Law Offices of Linda Rose Fessler, counsel of record herein (App. A-46).

On March 21, 2008, the Board denied Petitioner's Petition for Review, issuing its final decision in the matter (App. A-27).

On May 16, 2008, Petitioner filed his Petition for Review with the Court of Appeals for the Federal Circuit (App. A-56).

On January 12, 2009, the United States Court of Appeals for the Federal Circuit affirmed the Board's denial. (App. A-14)

By denying the appeal on procedural grounds, the Board has made it impossible for the matter to be

heard on its merits. Petitioner is not addressing the merits of his original appeal; all Petitioner wants is his constitutional right of due process, the chance for his appeal to be heard on its merits – for somebody other than the self-interested Agency to hear the facts.

REASONS FOR GRANTING THE WRIT

A. Board Policy Considerations Counsel Against Dismissals For Untimely Filing And Militate For Providing Employees With A Hearing On The Merits Of Their Appeals

In *Walls v. Merit Systems Protection Bd., 29 F.3d 1578 (Fed. Cir. 07/26/1994)* the United States Court of Appeals for the Federal Circuit (hereinafter the "Court") said (at [22]):

> The Board has acknowledged that its "regulations include no specific criteria for determining when good cause has been shown for waiving the time limitation on the filing of an appeal." *Alonzo v. Department of the Air Force, 4 M.S.P.R. 180, 184 (1980).* Furthermore, the Board has also noted that **policy considerations counsel against dismissals for untimely filing and militate for providing employees with a hearing on the merits of their appeals**, *id.* at 183 (citing S. Rep. No. 969, 95th Cong., 2d Sess. 24, 51 (1978), reprinted in 1978 *U.S.C.C.A.N. 2723, 2773*), and that "**broad equitable principles of Justice and good conscience" should be applied in good cause determinations**, *id.* at 184. [emphasis added] *Walls v. Merit Systems Protection Bd., 29 F.3d 1578 (Fed. Cir. 07/26/1994)*

In the within case, Petitioner was discharged for cause by the Agency (App. A-69), and filed an untimely appeal to the Board (App. A-40; A-41). The Board dismissed his appeal for the untimeliness (App. A-27), and the Court affirmed that dismissal (App. A-14), so that Petitioner did not have a hearing on the merits of his case. This runs directly counter to the Court's interpretation of the Board's stated policy that "broad equitable principles of Justice and good conscience should be applied in good cause determinations."

B. If The Employee Gives A Reasonable Excuse For The Delay, Such Excuse Should Be Accepted By The Presiding Official, Absent A Showing Of Substantial Prejudice To The Agency Caused By The Delay In Filing.

The Petitioner gave reasons for his late filing, specifically citing a related criminal case where he was awaiting a determination by the Federal Prosecutor of whether he was facing a felony or a misdemeanor charge (App. A-81; A-85), and specifically stating that he thought the time for filing his appeal ran from the date of that determination (App. A-44). Petitioner was *pro se*, (and thus without benefit of counsel), facing a hugely life-altering event, and made a decision he thought was correct. The Petitioner's decision was reinforced by a favorable unemployment benefits decision that seemed to support the merits of his case (App. A-88). Despite this, the Board (as affirmed by the Court) breached its own policy consideration that "...counsel[s] against dismissals for untimely filing and militate[s] for providing employees with a hearing on the merits of their appeals...(*Walls v. Merit Systems Protection Bd., 29 F.3d 1578 (Fed. Cir. 07/26/1994)*).

The Board and the affirming Court further ignored the Court's determination that "...broad equitable principles of Justice and good conscience should be applied in good cause determinations.... **If the employee gives a reasonable excuse for the delay, such excuse should be accepted by the presiding official, absent a showing of substantial prejudice to the agency caused by the delay in filing.**" [emphasis added] (*Walls v. Merit Systems Protection Bd., 29 F.3d 1578 (Fed. Cir. 07/26/1994)*). Since the Agency was silent on the matter of "...substantial prejudice to the agency caused by the delay in filing," one must presume there was no prejudice to the Agency resulting from Petitioner's late filing.

In *Walls*, the Court concluded simply that "Because petitioner has shown good cause for his untimely filing and because the Agency has made no showing of substantial prejudice flowing from the...filing delay, we hold that the AJ abused his discretion by not waiving the filing deadline for good cause." (*Walls v. Merit Systems Protection Bd., 29 F.3d 1578 (Fed. Cir. 07/26/1994)*) Similarly, in *Pyles v. Merit Systems Protection Bd., 45 F.3d 411 (Fed. Cir. 01/10/1995)*, the Court found that " [38] Because Pyles showed good cause for her untimely filing, and the OPM made no effort to show substantial prejudice flowing from the delay, we hold that the denial of the waiver was an abuse of discretion."

In the within case, Petitioner presented reasons he clearly believed were sufficiently substantial to merit a waiver of the untimely filing, whereas the Agency made no effort to show substantial prejudice flowing from the delay. Petitioner's case should, therefore, be

heard on its merits, and not be dismissed on procedural grounds.

C. Any Doubt About Whether Good Cause Has Been Shown Should Be Resolved In Favor Of An Appellant. Good Cause Is An Elastic Concept [Which] Entitles The Employee To The Application Of The Broad Equitable Principles Of Justice And Good Conscience

In *Ceja v. United States, 710 F.2d 812 (Fed. Cir. 06/27/1983)* the Court noted that "[21] *Alonzo, et al. v. Department of the Air Force, et al.*, 80 FMSR para. 7032 (1980) is the seminal decision of the MSPB which delineates the factors which are to be considered in deciding whether the...time limit for appeal is to be waived." The Court then further notes that the *Alonzo* decision states in part:

> [22] If the employee gives a reasonable excuse for the delay, **such excuse should be accepted by the presiding official, absent a showing of substantial prejudice to the agency caused by the delay in filing**. The appellant need not show an utter impossibility, but only that the delay was excusable in light of the particular facts and attending circumstances where diligence or ordinary prudence has been exercised....
>
> [24] Generally, we believe that in cases such as these, **any doubt about whether good cause has been shown should be resolved in favor of an appellant**. In determining whether the agency was unduly prejudiced by the delay, we have balanced the equities involved, weighing the difficulties of the agency against the benefit to the appellant. [emphasis added]

Ceja v. United States, 710 F.2d 812 (Fed. Cir. 06/27/1983)

In *Pfaehler v. Merit Systems Protection Board, 783 F.2d 187 (Fed. Cir. 02/10/1986)* the Court once again addresses this issue by saying that "[27]... in keeping with *Alonzo*: "good cause is an elastic concept [which] entitles the employee to the application of the broad equitable principles of justice and good conscience". *4 M.S.P.R. at 183-4.*"

The foregoing statements seem to leave no doubt that the Board should have waived the late filing in the within case, and reviewed the case on its merits, and that the Court should have reversed the Board's dismissal.

In *Yuni v. Merit Systems Protection Board, 784 F.2d 381 (Fed. Cir. 02/19/1986)* the Court said:

> [31] Once more we seek to apply the wisdom expressed by the MSPB in *Alonzo v. Department of the Air Force, 4 M.S.P.R. 180, 183-84 (1980)*: "'good cause' is an elastic concept . . . [which] entitles the employee to the application of the broad equitable principles of justice and good conscience." In *Ceja v. United States, 710 F.2d 812, 814 (Fed. Cir. 1983)*, this court quoted *Alonzo* with approval to the effect that any doubt as to whether good cause has been shown should be resolved in favor of an appellant, that an appellant need not show impossibility but only that the delay was excusable in light of the surrounding circumstances where ordinary prudence had been exercised, and that a reasonable excuse should be accepted by the presiding official absent proof of substantial prejudice to the agency.
>
> *Yuni v. Merit Systems Protection Board, 784 F.2d 381 (Fed. Cir. 02/19/1986)*

The Court acknowledged that "[16] The statutory provisions for appeals to the board give the board broad discretion in handling appeals and controlling its own docket by requiring that appeals be processed in accordance with regulations prescribed by the board." *Phillips v. United States Postal Service, 695 F.2d 1389 (Fed. Cir. 12/23/1982).* But in *Young v. Department of Commerce, 737 F.2d 1029 (Fed. Cir. 06/28/1984)* said:

> [23] Notwithstanding our deference to the M.S.P.B. under *Phillips*, we find here that the excuses offered by petitioners are reasonable and find no showing of prejudice to the agency in the record. Under the circumstances of this case, we hold that the M.S.P.B. abused its discretion in not accepting the three appeals.
> *Young v. Department of Commerce, 737 F.2d 1029 (Fed. Cir. 06/28/1984)*

As in *Young* and *Yuni*, Petitioner herein supplied the Board with "a reasonable excuse" in this case, and the Agency remained silent on the matter, declining to present "proof of substantial prejudice to the agency." Any doubt, therefore, should have been decided in favor of the Petitioner.

Although not precedential, it is interesting to note that the Utah Supreme Court determined that "An analysis of what constitutes an exception in the "interests of justice" should involve examination of both the meritoriousness of the petitioner's claim and the reason for an untimely filing." *Adams v. State, 123 P.3d 400, 2005 UT 62.* Thus, the principle that merit trumps timeliness extends beyond the Federal circuit, giving national impact to that principle that certainly should be applied to the within case.

D. The United States Court Of Appeals For The Federal Circuit Has Failed To Follow Its Own Precedents, Resulting In An Unjust Dismissal Of An Appeal On Procedural Grounds, Depriving Plaintiff Of His Fifth Amendment Right To Due Process.

In each of the above paragraphs A through C, the Court came down on the side of granting an appellant the broadest possible latitude when examining the reasons for an untimely appeal filing. This approach is entirely consistent with the Fifth Amendment to the *U.S. Constitution*, which states simply that "No person shall...be deprived of life, liberty, or property, without due process of law...."

In the within case, however, the Court ignored its earlier decisions, and affirmed the Board's determination that Petitioner had "...failed to demonstrate that his appeal was timely filed or that good cause existed for the delay." (App. A-14)

As a consequence of the Board's decision and the Court's affirmation of that decision, Petitioner has not had his appeal of the Agency determination heard on its merits, and has, therefore, been deprived of his constitutional right to due process.

CONCLUSION

Petitioner was discharged for cause by the Agency, and simultaneously charged with criminal conduct related to that discharge. He saw these matters as related, and mistakenly believed he had 30 days following finalizing of the criminal charges to file his appeal of the discharge to the Board.

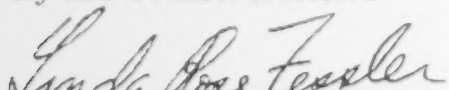
The Board dismissed his appeal as untimely in direct contradiction of its own rulings in similar cases, and subsequently denied his Petition for Review. The Court affirmed the Board's dismissal in direct contradiction of its own precedents in similar cases.

Consequently, Petitioner has not had his case heard at any level on its merits, a clear, unequivocal violation of his constitutional right to due process

For all the reasons stated above, and in the interest of equity and justice, Petitioner seeks a reversal of the Court's affirmation of the Board's decision to dismiss his appeal for untimely filing, and that his appeal be remanded to the Board for consideration on its merits.

Respectfully submitted,

ALEX M. GRIJALVA
By his Counsel of Record



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APPENDIX

Page

Federal Circuit Court of Appeals Judgment A-14
Initial MSPB Decision A-19
Final MSPB Decision.....A-27
MSPB's Acknowledgment Order A-30
Petitioner's Appeal to the MSPB (Form 185-1) A-40
Petitioner's Appeal to the MSPB (Form 185-2) A-41
Petitioner's Response to Timeliness Issue.....A-44
Petitioner's Petition for Review of MSPB Decision A-46
Petitioner's Opening Brief.....A-56
Petitioner's Termination letters.....A-69
Petitioner's Criminal Case papers A-81
Letter from Petitioner A-85
Petitioner's Unemployment Benefits Determination A-88

APPENDIX

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2008-3249

ALEX M. GRIJALVA,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

Petition for review of the Merit Systems Protection Board in SF 0752070815-I-1.

DECIDED: January 12, 2009

Before LOURIE, BRYSON, and GAJARSA, Circuit Judges.
PER CURIAM.

DECISION

Alex M. Grijalva challenges the decision of the Merit Systems Protection Board dismissing his petition for review as untimely filed. We affirm.

BACKGROUND

Mr. Grijalva was a maintenance mechanic with the Department of Homeland Security at the United States Coast Guard Integrated Support Command in

San Pedro, California. Mr. Grijalva's responsibilities included supervising inmates from the Federal Correctional Institution on Terminal Island, California, who were assigned to perform maintenance and repair duties at the Integrated Support Command as part of an inmate labor program. On June 19, 2007, the agency issued a notice of decision removing Mr. Grijalva from his position for aiding in the smuggling of prohibited items to Terminal Island inmates in exchange for money. The letter informed Mr. Grijalva of his right to appeal the decision to the Board within 30 days of his effective removal date of June 25, 2007, or within 30 days of his receipt of the removal decision. Mr. Grijalva filed an appeal with the Board on September 11, 2007.

In an acknowledgment order dated September 17, 2007, the administrative judge assigned to the case notified Mr. Grijalva that his appeal appeared to be untimely and advised Mr. Grijalva to respond with evidence showing that his appeal was timely filed or that good cause excused the filing delay. Although Mr. Grijalva filed a response to that order on September 21, 2007, his response did not address the timeliness issue. On September 26, 2007, Mr. Grijalva submitted a second response, in which he asked that the untimeliness of his appeal be excused because he had waited to appeal until after he received notice from the U.S. Attorneys office regarding the completion of its criminal investigation relating to his actions. Mr. Grijalva explained that he had filed his appeal with the Board after learning that he was being charged with a misdemeanor rather than a felony and after signing a plea agreement on September 13, 2007.

On November 26, 2007, the administrative judge dismissed Mr. Grijalva's appeal as untimely filed.

Mr. Grijalva then filed a petition for review with the full Board in which he again explained that he had incorrectly believed that he could not file his appeal of the agency's removal decision until he knew whether the U.S. Attorney intended to charge him with a felony or misdemeanor. The full Board denied Mr. Grijalva's petition for review, and Mr. Grijalva then petitioned for review by this court.

DISCUSSION

Board regulations provide that an appeal of an agency decision must be filed within 30 days of the effective date of the decision or within 30 days of the date that the appellant received the agency's decision, whichever is later. 5 C.F.R. §1201.22(b) (1). The Board can waive the time limit if the appellant shows good cause for the delay. Id. §1201.22(c). Whether the appellant's showing of good cause is sufficient to justify waiving the time limit "is a matter committed to the Board's discretion and this court will not substitute its own judgment for that of the Board." Mendoza v. Merit Sys. Prot. Bd., 966 F.2d 650, 653 (Fed. Cir. 1992) (en banc).

Because the agency's decision to remove Mr. Grijalva became effective on June 25, 2007, Mr. Grijalva's appeal on September 11, 2007, was 48 days late. The administrative judge found that the considerable length of the delay militated against waiving the time limit. The administrative judge further found that the agency's removal notice clearly explained the time limit for appealing the removal decision. The notice explained that Mr. Grijalva had the right to appeal the agency's decision so long as he filed his appeal within 30 calendar days of the effective date of removal or 30 calendar days after he re-

ceived the decision. Mr. Grijalva asserts that the administrative judge should have excused his delay because he thought that the 30-day time limit did not commence until he learned whether the U.S. Attorney was going to charge him with a misdemeanor or a felony. The administrative judge found that Mr. Grijalva's mistaken belief regarding the relevance of the criminal investigation did not constitute a circumstance beyond Mr. Grijalva's control that affected his ability to file an appeal in a timely manner. Therefore, the administrative judge concluded that Mr. Grijalva failed to show good cause for the delay.

Mr. Grijalva argues that he gave a "reasonable excuse for the delay," and that the administrative judge was therefore required to forgive his untimely filing "absent a showing of substantial prejudice to the agency caused by the delay in filing." Walls v. Merit Sys. Prot. Bd. 29 F.3d 1578, 1582 (Fed. Cir. 1994). To establish good cause or a reasonable excuse for a delay, however, an appellant must show that he exercised due diligence or ordinary prudence under the circumstances. Ceja v. United States, 710 F.2d 812, 814 (Fed. Cir. 1983); Phillips v. U.S. Postal Serv., 695 F.2d 1389, 1391 (Fed. Cir. 1982). In this case, the agency's removal notice contained a plain and unambiguous statement that the 30-day time limit began on the date the decision became effective. See Stahl v. Merit. Sys. Prot. Bd., 83 F.3d 409, 412 (Fed. Cir. 1996). The notice contained nothing to suggest that the time limit would not start to run until the U.S. Attorney made a charging decision in the criminal proceeding, or until that proceeding was completed. Under these circumstances, we hold that the Board did not abuse its discretion in concluding that Mr. Grijalva failed to show that he exercised ordinary prudence justifying waiver of the

filing deadline.

In a case involving a delay in filing a Board appeal, the appellant has the initial burden of showing a reasonable excuse for the delay, and the agency is required to show prejudice only if the appellant has made that showing of good cause, Womack v. Merit. Sys. Prot. Bd., 798 F.2d 453, 456 (Fed. Cir. 1986). Because the administrative judge concluded that Mr. Grijalva failed to show good cause justifying his untimely filing, the agency's failure to submit evidence of substantial prejudice flowing from that delay was immaterial.

Mr. Grijalva further contends that "broad equitable principles of justice" support a waiver of the time limit, see Walls, 29 F.3d at 1582, and that any doubt as to good cause must be resolved in his favor, see Ceja, 710 F.2d at 814. However, the administrative judge found that the agency decision clearly notified Mr. Grijalva of the time limit to appeal its decision, that the delay was considerable, and that no circumstances beyond Mr. Grijalva's control affected his ability to file his appeal in a timely manner. Those are appropriate factors for the Board to consider when determining whether to grant a good-cause waiver. See Walls, 29 F.3d at 1581. In light of the administrative judge's findings, we see no reason to disturb the Board's conclusion that Mr. Grijalva failed to show good cause for his untimely filing. We therefore affirm the dismissal of his appeal on that ground.

APPENDIX

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

ALEX M. GRIJALVA,
Appellant,

DOCKET NUMBER
SF-0752-07-0815-I-1

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DATE: November 26, 2007

Alex M. Grijalva, San Pedro, California, pro se. Paul N. Janoff, Alameda, California, for the agency.

BEFORE
LuNell C. Anderson
Administrative Judge

INITIAL DECISION

The appellant filed an appeal of a decision by the Department of Homeland Security to remove him from his position as a Maintenance Mechanic, WG-4749- 09, effective June 25, 2007. Initial Appeal File (IAF), Tab 1. For the reasons set forth below, the appeal is DISMISSED as untimely filed.

ANALYSIS AND FINDINGS

Background

The following facts have not been disputed by the parties. On June 19, 2007, the agency issued a letter of decision removing the appellant from his position as a Maintenance Mechanic for providing prohibited objects and for coordinating/aiding the

smuggling of prohibited objects to inmates in exchange for money at the Federal Correctional Institution, Terminal Island, San Pedro, California. IAF, Tab 1 and Tab 7, Exhibit 3. The agency's decision letter stated that the appellant's removal would be effective June 25, 2007. It further stated that the appellant could appeal the agency's decision to the Merit Systems Protection Board, but such an appeal must be filed within 30 calendar days of the effective date of the decision. *See* Initial Appeal File (IAF), Tab 7, Exhibit 3. To be timely, the appellant was required to file his appeal no later than July 25, 2007. The appellant subsequently filed the instant appeal on September 11, 2007, 48 days late. *See* IAF, Tab 1.

Because it appeared that the appellant's petition for appeal was untimely filed, an acknowledgment order was issued on September 17, 2007, advising the appellant of the Board's filing requirements and ordering him to respond within 10 days with evidence and/or argument showing that his appeal was timely filed or that good cause existed for the delay. *See* IAF, Tab 2.

The appellant filed a response September 21, 2007, which consisted of a copy of the Notice of Proposed Removal, the June 13, 2007 decision letter that was later rescinded, his written response to the proposal and written declaration to Administrative Law Judge J. Henley. IAF, Tab 4. The appellant did not address the timeliness issue noted in the Board's acknowledgment order. In a submission received September 26, 2007, the appellant requested that his tardiness for not meeting the 30-day time frame for filing an appeal be excused because he did not get word from the U.S. Attorney's office about the completion of their investigation until September 11,

2007. The appellant goes on to state that he met with his attorney to sign a plea agreement on September 13, 2007, and that once he knew he was not going to be charged with a felony, he filed his appeal with the Board.

The agency responded to the acknowledgment order by filing a motion to dismiss the appeal as untimely. *See* IAF, Tab 7. The agency also provided a copy of the certified mail receipt showing that the appellant received the decision letter on June 19, 2007. IAF, Tab 7, Exhibit 2. The appellant responded by stating that the denial of his unemployment benefits was reversed. IAF, Tabs 6 and 8.

The appellant has not shown good cause for the untimely filing of his appeal.

It is the appellant's burden to prove, by a preponderance of the evidence, that his appeal is timely filed. *See* 5 C.F.R. § 1201.56(a)(2)(ii). Under 5 C.F.R. § 1201.22(b), appeals to the Board must be filed no later than 30 days after the effective date of the action being appealed, or 30 days after the date of receipt of the agency's decision, whichever is later. An administrative judge may waive the requirement for timely filing upon a showing of "good cause." *See* 5 C.F.R. § 1201.12. Factors for consideration by an administrative judge in determining good cause include the following: the length of the delay; whether the appellant was notified of the time limit or was otherwise aware of it; the existence of circumstances beyond the control of the appellant which affected his ability to comply with the time limits; and the degree to which negligence by the appellant has been shown to be present or absent. *See Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980).

Based on the evidence of record, I find that the appellant has failed to show that his appeal was timely filed or that good cause existed for the delay. The appellant's initial contact with the Board indicates that it was filed 48 days late and I find that a 48-day delay is considerable and weighs against a finding that the Board's filing deadline should be waived. *See Simon v. Department of Veterans Affairs*, 65 M.S.P.R. 176, 180-181 (1994) (Board refuses to excuse even a one-day delay in filing where good cause for the delay is not shown), *review dismissed*, 52 F.3d 343 (Fed. Cir. 1995) (Table). I also find that the agency's removal notice clearly informed the appellant that his appeal must be filed no later than 30 calendar days after the effective date of his removal. *See Stahl v. Merit Systems Protection Board*, 83 F.3d 409, 412 (Fed. Cir. 1996) (Federal Circuit affirms dismissal of untimely appeal where agency's decision letter clearly informed employee of time limits for filing Board appeal). Finally, although the appellant appears to imply that he was waiting on the completion of a criminal investigation that resulted in a misdemeanor charge as opposed to a felony, the appellant has failed to present any evidence of circumstances beyond his control which affected his ability to file in a timely manner.

Accordingly, I find that the appellant has failed to demonstrate that his appeal was timely filed or that good cause existed for the delay. The agency's motion to dismiss this appeal as untimely filed is GRANTED.

APPENDIX

DECISION

The appeal is DISMISSED.

FOR THE BOARD: /s/ LuNell C. Anderson
LuNell C. Anderson
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **December 31, 2007,** unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

APPENDIX

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury *(see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board

receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

APPENDIX

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

Electronic Mail

Alex M. Grijalva
727 West 15th Street
San Pedro, CA 90731

Agency Representative

U.S. Mail

Paul N. Janoff
Department of
Homeland Security
Coast Guard Island
MLCPAC
Building 54A
Alameda, CA 94501

November 26, 2007

/s/ Judy Mattias
Judy Mattias
Paralegal Specialist

APPENDIX

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ALEX M. GRIJALVA,
Appellant,

DOCKET NUMBER
SF-0752-07-0815-I-1

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DATE: March 21, 2008

Linda R. Fessler, Esquire, Los Angeles, California, for the appellant.
Paul N. Janoff, Alameda, California, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

FINAL ORDER

The appellant has Filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously un-

available, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that Filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need Further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5

U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD: /s/ William D. Spencer
William D. Spencer
Clerk of the Board

Washington, D.C.

APPENDIX

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

ALEX M. GRIJALVA,
Appellant,

DOCKET NUMBER
SF-0752-07-0815-I-1

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DATE: November 17, 2007

ACKNOWLEDGMENT ORDER.

This office has received the appellant's petition for appeal. A copy of the appeal is being sent to the agency with this Order. I am the administrative judge assigned to this appeal.

I ORDER the parties to follow the procedures set out in the separate notices below. If any party fails to follow my orders or the Board's regulations, I may impose sanctions pursuant. to 5 C.F.R. § 1201.43. If either party has a question regarding any aspect of the case processing instructions set forth in this order, he or she may seek clarification from me at the phone number listed at the end of this order.

NOTICE TO APPELLANT

INTRODUCTION

If your appeal is timely filed, and within the Board's jurisdiction you have the right to a hearing on the merits of your case. If you requested a hearing, I. will schedule a hearing for you. If you did not request a hearing, you have 10 calendar days from

the date of this Order to tile a written request for one. If you do not request a hearing, you waive your right to one. In that event, you and the agency will be given an opportunity to make written submissions before the record on your appeal closes.

TIMELINESS

Generally, you must file an appeal with the Board no later than 30 calendar days after the effective date, if any, of thc action you arc challenging, or 30 calendar days after the date you receive the agency's decision, whichever is later, 5 CEP,. § 1201.22(b). Under 5 C.F.R. §1201.41(l), the filing date for each of the, ways in which an appeal can be filed is: Mail – the postmark date, but if there is no legible postmark date, mailing is presumed to have been five business days before receipt; Personal Delivery – the date we receive the appeal; Fax – the date of the fax; Commercial Overnight Delivery – the date the document was delivered to the commercial overnight delivery service; Electronic Mail – the date on which thc electronic mad is sent. **It appears that, the filing period in this case began on June 25, 2007, and that your appeal was filed by Electronic Mail on September 11, 2007. It therefore appears that your appeal was Iliad approximately 2 ½ months late.** Because your appeal appears to have been filed after the tune limit under these rules, it may be untimely.

If you and the agency agreed in writing to participate in an alternative dispute resolution process before filing your appeal, the than limit for filing your appeal is extended for an additional 30 calendar days, for a total of 60 calendar days. In such a case, your response to this Order must include a copy of the written agreement.

Further, there is an exception to the 30-day filing rule of 5 C.F.R. § 1201.22(b), set out in 5 C.F.R. § 1201.154(h). Pursuant to this provision, an appellant who was subject to an action that is appealable to the Board and who filed a timely formal discrimination complaint with the agency may file an appeal (1) within 30 days after receipt of the agency resolution or final decision on the complaint or, (2) at any time after the expiration of 120 calendar days if the agency has not resolved the matter or issued a final decision within the 120-day period.

Before the Board will consider any other issue raised. by your appeal, you must show by preponderant evidence that the appeal. was filed on. time or that good cause exists for the delay in filing. Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as it whole, would need to find that a contested fact is more likely true than untrue. 5 C.F.R. § 1201.56(c)(2). In other words, you must show that it is more likely than not that your appeal was filed on time or that good cause exists for the delay.

Accordingly, if you claim that you filed your appeal on time under any of the filing rules listed above, I ORDER. you to file evidence and/or argument showing that you did so. You must provide all of the details explaining your actions concerning the filing. If the apparent untimeliness of your appeal is due to your late receipt of the decision you are appealing, you must also submit evidence and. argument as to the date you received it. If you have postal receipts or other proof of mailing, you should send a legible copy of them with your response.

If you did. not file your appeal on time, I ORDER you file evidence and/or argument showing that good cause exists for the delay in filing. To show that.

there was good cause for a delay in -filing, you must show that, you acted reasonably and with due diligence under the particular circumstances of your case. The factors the Board will look at to determine whether you acted reasonably include, but are not limited to: (1) the length of the delay; (2) whether you were notified of the time limit or were otherwise aware of it; (3) the existence of circumstances beyond your control which affected your ability to comply with the time limit, and the possibility of negligence on your part; (.4) circumstances which show ii t any neglect On so t part was excusable; (5) whether there was unavoidable casualty or misfortune that affected your ability to timely file your appeal; and (6) whether not applying the time limit to you would harm the agency. In your response to this Order addressing the timeliness issue, be as specific as possible by giving all of the details. You should also include any evidence that supports the reason for your delay.

If an illness prevented you from filing your appeal within the time limit, you must identify the time period during which you suffered from the illness, submit medical evidence and any other supporting evidence showing that you suffered from the illness during the relevant time period, and explain how the illness prevented you from filing your appeal on time or requesting an extension of time to file. If medical evidence is not available, you must submit other supporting evidence and explain why medical evidence is not as available.

Any explanation of the reason for a late appeal must also address why you could not have filed a timely request for an extension of the filing time limit.

Your response to this Order must be in the form

of an affidavit, sworn statement, or declaration under penalty of perjury, 28 U.S.C. § 1746, a form for which is found in the. Board's regulations at 5 C.F.R. Part 1201, Appendix IV. Although there are limited circumstances in which a hearing may be held on the question of the timeliness of an appeal, you should submit all evidence and argument you wish me to consider on that issue, and not withhold, anything in expectation that a hearing may be held. Your submission must he filed within 10 calendar days of the date of this Order, and you must serve a copy of it on the agency at the same time.

ORDER TO THE AGENCY

The agency is ORDERED to file any evidence that it has on. the timeliness issue within. 20 calendar days of the date of this Order, and may submit argument as well.

****

Unless tell the parties otherwise, the record on the timeliness issue will close on the date the agency's response is due. That means I will not accept any more evidence or argument on that issue that is filed after that date unless the party submitting it shows it was not readily available prior to the close of the record. 5 C.F.R. § 1201.58(c).

DESIGNATION OF REPRESENTATIVE

You may name a representative. If you already have a representative, you must fill out the enclosed "Designation of .Representative" form and file it with the Board and with the agency within 10 calendar days of the date of this Order unless you have included your representative's name, address, tele-

phone number, and signature in your appeal. If your representative has filed the appeal for you and you have not personally signed the appeal or submitted signed "Designation of Representative" form, you also must file a signed "Designation of Representative Form" with the Board and with the agency within 10 calendar days of the date of this Order. If you. name a representative after receiving this Order, fill out the enclosed "Designation of Representative" form and file it with the Board and the agency immediately after obtaining your representative.

You must immediately notify the Board and the agency in writing of any changes in the name, address, or telephone, number of your designated representative.

If you register as an e-filer (see information below), you can one electronic filing to file a Designation of Representative, or to notify the Board of a change in contact information.

SETTLEMENT

I have directed the agency to contact you within 35 calendar days of the date of this Order to define the issues, agree to stipulations, and discuss the possibility of settlement. I am available to assist in the discussions. You must discuss concrete, specific settlement proposals with the agency unless either party concludes in good faith that no compromise of any kind is possible. You must also be prepared to discuss with me the status of your settlement discussions,

If you agree to settle your appeal, and you enter the agreement into the record, the Board will retain the authority to enforce its terms. However, if you do not enter the agreement into the record, the Board will have no authority to enforce the agreement.

APPENDIX

DISCOVERY

Discovery is the procedure you may use to learn of any facts, documents, or other evidence the agency has that may be helpful to your case. If you wish to engage in discovery, initial requests or motions must he filed within 25 calendar days of the date of this Order. Responses to initial discovery requests must be filed promptly but no later than 20 days after the date of service of the other party's discovery request or the MSPB order. Unless you are filing a motion to compel, you must not submit your discovery requests and responses to the Board. If you do, they will be rejected and returned to you. The procedures used for discovery are at 5 C.F.R. §§1201.71-.85.

It is the policy of the Beard to decide an appeal within 120 calendar days of receipt. The Board expects all parties to assist in the expeditious processing of this case by honoring requests for relevant documents and producing material witnesses without additional Board intervention.

RESPONSE TO MOTIONS

You may file a response or objection to any motion filed by the agency. Unless otherwise specified by me or the Board's regulations, your response or objection must be filed with this office and served upon the agency within 10 calendar days of the date that appears on the agency's certificate of service. I will reject any untimely response or objection unless you show good cause for the delay in filing.

GENERAL INSTRUCTIONS

Pursuant to 5 C.F.R. 1201.26, all submissions filed with the card must be:

(1) Legible and on 8 1/2- by 11-inch paper;

(2) All documents within a tab must have new

page numbers (by hand if necessary) so that each document, within each tab, is re-numbered, from the first page of the first document to the last page of the last document. This will. allow for specific page references to the record, by tab and by page number within a tab. The new page numbers should be placed in the bottom right-hand margin of each page. If some pages within a tab are already numbered in the bottom-right margin, parties should place the new page numbers .just to the right of the original page numbers.

(3) Served upon (personally delivered, mailed or faxed) opposing parties and their representatives;

(4) Filed by the date set by me or the Board's regulations. The date of filing is he date your submission is postmarked, faxed, or the date of receipt if you personally deliver it to the Board's regional office; and

(5) Accompanied by a certificate of service stating (a) the names and addresses of the parties served; (b) whether service was by mail, fax, or by personal delivery; and (c) the date of service.

A certificate of service is attached to this Order and lists the names and addresses of the parties who must be served in this ease. The attached :certificate of service constitutes a model which you may follow in preparing your own certificate of service. The Board may reject a submission that does not have a certificate of service. If you register as an e-filer, a certificate of service will be prepared automatically as part of the pleading you file online.

Extensions of filing dates will only be granted if

requested in writing and if good cause is shown. A continuance of a hearing date will be granted only if requested in writing and if you are able to show extraordinary circumstances.

ELECTRONIC FILING

Pursuant to 5 C.F.R. § 1201.14, a party or representative who registers as an e-filer may file and receive documents in electronic form. Such registration and filing can be done at the Board's e-Appeal site (https://e-appeal.mspb.gov). More information about electronic tiling is attached to this order.

REGULATIONS

For more detailed information on these procedures, you should refer to the Board's regulations in 5 C.F.R. Part 1201. The regulations are available for review in agency personnel offices, law libraries, some large public libraries, and at the Board's website (http://www.mspb.gov/title5.html)

NOTICE TO AGENCY/INTERVENOR

AGENCY RESPONSE

I ORDER the agency to read, comply with, and/or respond to any and all portions of the "Notice to Appellant" which are applicable to it. I also ORDER the agency to serve me, appellant, and appellant's representative (if applicable), with the material listed on the enclosed schedule and any other information 'required by 5 C.F.R. § 1201.25 within 20 calendar days of the date of this Order.

DESIGNATION OF REPRESENTATIVE

The agency must designate a representative. I ORDER the agency to file the name, address, and

telephone number of the person authorized to act for the agency on the enclosed "Designation of Representative" form within 20 calendar days of the date of this Order. The representative must have authority to settle this appeal or be able to directly reach someone with that authority on short notice.

SETTLEMENT

I DIRECT the agency to contact. the appellant within 35 calendar days of the date of this Order to define the issues, agree to stipulations, and discuss the possibility of settlement. I am available to assist in the discussions. The agency must discuss concrete, specific settlement proposals with the appellant, unless either party concludes in good faith that no compromise of any kind is possible. The agency must also he prepared to discuss with me the status of its settlement discussions.

FOR THE BOARD: _____

LuNell Anderson
Administrative judge Western
Regional Office
201 Mission Street, Suite 2310
San Francisco, CA 94105-1831
4 Is) 904-6772
(415) 904-0580
V/TDD (800) 877-8339

Enclosures

APPENDIX

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
FORM 185-1
Appeal Form – Appellant and Agency Information

1. Name: Grijalva, Alex M.
2. Address: 727 W 15th St, San Pedro, CA 90731, USA
3. Telephone numbers and email address:
   Home: (310) 519-0832; Work: (310) 732-3585
   email: grijmald54@sbcglobal.net
4. Do you wish to designate a representative: No
5. Name and address of the Agency that made the decisions or took the action you are appealing:
   Department of Homeland Security
   U.S. Coast Guard
   1001 S Seaside Ave
   San Pedro, CA 90731
6. Federal employment status at the time of the decision: Permanent
7. Type of appointment: N/A
8. Occupational series, position title, grade and duty station at time of decision:
   Occupational series: WG-4749; Title: Maintenance
   Grade: WG-9; Duty Station: ISC San Pedro
9. Are you entitled to veteran's preferences? Yes
10. Length of government service: 24 yrs 6 mos
11. Were you serving a probationary of trial period at the time of the decision? No
12. Do you want a hearing? Yes
13. Do you elect to E-file? Yes
14. I certify that all the statements made in this form and all attached forms are true, complete, and correct to the best of my knowledge and belief.
    ALEX MALDONADO GRIJALVA, Appellant

APPENDIX

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
FORM 185-2
Appeal of Agency Personnel Action or Decision (Non-retirement)

Name: Grijalva, Alex M.

1. Description of personnel action: Removal (Termination after probationary period)

2. Date you received agency's proposal letter: 05/21/2007

3. Date you received agency's final decision letter: 06/19/2007

4. Effective date of the agency action: 06/25/2007

5. Did you and the agency attempt ADR? No

6. Explain why you think the agency was wrong in taking this action or making this decision:

   I was terminated for giving inmates contraband (Prohibited Objects). First t would like to say that when the investigation first began I requested union representation. It was never granted. However, I was still very honest & cooperated with authorities. I was alone in this & was very much intimidated by all questioning. I could not afford an attorney. I was not alone in this as far as giving inmates contraband. Everyone in the DC Shop where we all worked together gave these men prohibited objects, including Mr. Daniel Rangel DC Shop supervisor. Food & mag-

azines were also prohibited. Mr Rangel would often turn a blind eye to all that was going on in his shop. We would collect monies from shop members to buy the inmates cake & ice cream on their birthdays. We would also collect & sell aluminum & plastic bottles. With this money we would have DC Shop parties. The inmates were always invited. They would help with the food preparations. Inmates would also share their prison food with everyone including DC Shop supervisor Mr. Rangel. Other Shop supervisors were doing the same thing with their inmates. Myself & one other Coastie were honest about what was going on, P.O. Deland. I was on lite duty due to a neck surgery & became very dependent on these men to help me do my job. My neuro-surgeon Mahomar said they're just making excuses because of your disability. My newly appointed attorney said what I did was not a felony but a Minor Misdemeanor, I believe I was discriminated against because of my disability/race. I was singled out of many & terminated.

7. What action would you like the Board to take in this case?

I asked for reconsideration on the termination, because I was doing my job without too many problems. My restrictions included no heavy lifting, but I met all my requirements on my evals. I have 24 ½ good years with four military agencies, 2 years Army, 4 years Air Force, 8 years Navy, and 12 years with the Coast Guard. 22 years were in the same capacity, building maintenance. I've never been in any kind of trouble. I made a mistake – my first and only mistake. I admitted to it,

and cooperated with everyone. I believe this could have been handled in a much different manner, with rehabilitation, suspension, or a fine. But termination is too much punishment. It destroyed me. They only honored my disability restrictions for about the first 3 weeks I returned to work.

8. Have you filed a grievance under a negotiated grievance procedure? No

9. If yes, on what date? N/A

10. If yes, has a decision been issued? N/A

APPENDIX

RESPONSE TO TIMELINESS ISSUE

ALEX M. GRIJALVA v DEPARTMENT OF HOMELAND SECURITY

Docket # SF-0752-07-0815-I-1

Response to TIMELINESS. THE 30 DAY TIME FRAME WAS NOT MET.
Dated 9/17/2007

Summary Page

Case Title: ALEX M. GRIJALVA v DEPARTMENT OF HOMELAND SECURITY
Docket Number: SF-0752-07-0815-I-1
Pleading title: Response to TIMELINESS. THE 30 DAY TIME FRAME WAS NOT MET.
Dated 9/17/2007
Filer's name: Alex M. Grijalva
Filer's pleading role: Appellant

Details about the supporting documentation:
N/A

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1. Would you like to enter the text online? Online

2. Your response to the notice or order:
Please excuse my tardiness for not meeting the 30 day time frame for filing an appeal. I didn't get word from the U.S. Attorney's office about the completion of their investigation until 09/11/2007/

Then I met with my attorney 09/13/2007 to sign a

plea agreement. I did not know how the U.S. Attorney's Office investigation was going to come out. Once they told me I was not being charged with a felony, and only a minor misdemeanor, I filed my appeal. I sent a coy of the plea agreement by fax on 09/17/2007 to the MSPB.

3. Does your pleading assert facts you know from your personal knowledge? Yes.

4. Do you declare under penalty of perjury, that the facts stated in this pleading are true and correct? Yes

APPENDIX

U.S. MERIT SYSTEMS PROTECTION BOARD

APPELLANT'S PETITION FOR REVIEW FORM

PLEASE COPY THE FOLLOWING FROM YOUR DECISION:

CASE NAME: ALEX M. GRIJALVA, Appellant; *DEPARTMENT OF HOMELAND SECURITY, Agency.*

Docket No : SF-0752-07-0815-I-1-1

Initial or Addendum Decision Finality Date: (See "Notice to Appellant" section of decision for "finality" date)

INSTRUCTIONS FOR COMPLETING PETITION FOR REVIEW FORM

The Board may grant your Petition for Review if you show that:

1. the appeal was wrongly decided based on the evidence already in the record;
2. there is new evidence, which was previously unavailable despite your due diligence, that supports a different outcome; or
3. errors in the way the appeals proceeding was handled denied you the opportunity to fairly present your case.

If you decide to file a Petition for Review, you may use this form although you are not required to do so. If you use this form, please read the instructions carefully.. Before completing this form, you should read the attached copy of the Board's regulations at 5 C.F.R. § 1201.114 through 5 C.F.R. § 1201.120.

IT IS IMPORTANT TO FILE YOUR PETITION ON OR BEFORE THE FINALITY DATE IN THE

INITIAL OR ADDENDUM DECISION. IF YOU DO NOT. THE BOARD MAY REFUSE TO CONSIDER YOUR PETITION.

The date of filing is the date you mail (by U.S. Mail or commercial overnight delivery), fax, or hand-deliver your petition to the Board. If you will be unable to file your Petition for Review by the finality date, you must request an extension of time from the Clerk of the Board BEFORE THE FINALITY DATE. If your Petition for Review is filed after the finality date, you MUST complete Attachment B and submit it with your Petition for Review.

YOU SHOULD NOT SUBMIT ANY EVIDENCE OR PAPERS THAT WERE SUBMITTED TO THE JUDGE BY YOU, BY YOUR REPRESENTATIVES (IF ANY), OR BY THE AGENCY. The Board will already have that information when it considers your petition.

After you complete this form you should send it, together with any attachments, by mail, personal delivery, fax, or commercial overnight delivery to:

The Clerk of the Board
U.S. Merit Systems Protection Board
5th Floor Mail Room
1615 M Street, NW
Washington, DC 20419

TELEPHONE NUMBER: (202) 653-7200 OR
(800) 209-8960
FAX NUMBER: (202) 653-7130

You must also send a copy of the form and all of the attachments to the agency and to any other party listed on Attachment A, Certificate of Service, at the addresses on the certificate. A COMPLETED COPY OF ATTACHMENT A MUST BE SENT TO THE BOARD AND TO EACH PARTY TO WHOM YOU SEND YOUR PETITION FOR REVIEW.

Please answer as many of the following questions as best you can. DO NOT DELAY FILING THIS PETITION BECAUSE YOU CANNOT ANSWER SOME OF THE QUESTIONS. Your answers to these questions will help the Board to decide whether to grant your Petition for Review. You do not have to answer "Yes" to every question for the Board to grant your Petition for Review.

The Board is interested in what you believe were errors that caused an incorrect result in your appeal, or new evidence you have discovered that would lead to a different result. If a particular question does not relate to such matters, feel free to leave it blank. Your answers should refer to the decision of the judge or to specific evidence or documents that were presented to the judge, if possible. If the administrative judge dismissed your case because of lack of jurisdiction or because your appeal was untimely, you must only address those issues. The other issues in your case will be addressed later, if the Board rules in your favor on the jurisdiction or timeliness issues. If you do not have enough space on the form to answer a question, or if you use a computer to print your answers, you may attach extra sheets. Please type or clearly print your answers.

APPENDIX

NOTE: This form can be downloaded in HTML or PDF format from the Board's Website. The advantage of using an electronic form is that you are able to fill in the requested information as a regular document on your personal computer (PC). Before you begin answering any of the questions, you should save (download) the file to your PC's C drive. NOTE: Once you have completed filling out the form (and have saved it), you still must print out copies, sign the form(s) in the appropriate spaces, and serve the form on the Board and the other party(s) as explained above.

QUESTIONS

1. Is this petition being filed on or before the decision finality date? (See "Notice to Appellant" section of the Initial or Addendum Decision for "finality" date.) ☑ YES ☐ NO (IF YOUR ANSWER IS NO, YOU MUST COMPLETE ATTACHMENT B AND RETURN IT WITH THIS FORM.)

2. Have you been denied any procedures during your appeal to the MSPB to which you believe you were entitled? Examples of procedures include holding a hearing, submitting evidence, and calling witnesses. If so, what procedures were denied and why do you believe you were entitles to them? Did you raise this matter with the judge? Please describe how not having this procedure has harmed you.

Appeal was dismissed because it was not timely filed. The purpose of this entire review system is to ensure that justice is accomplished, and that an accused gets his chance to explain his actions and to make an attempt to resolve the problem. From the beginning, Mr. Grijalva found himself on the wrong side of

everything that was happening. He had not willingly and purposefully violated any law or procedure, but was just doing what everyone else was doing. When it turned out, however, that he had transgressed, he cooperated fully with the authorities to solve the situation. (See 4 below)

3. Do you have any documents or evidence that are important to your appeal that were not filed with the judge before the record closed? If so, you should attach these documents and evidence. Explain why you did not submit these documents or evidence to the judge, and why it is important for the Board to consider them. Explain why you believe that these documents and evidence should change the result in your case. (The Board will not normally consider documents or evidence which were not submitted to the judge unless you can show that the evidence did not exist before the record closed or that you could not have been reasonably expected to have found the evidence before the record closed.)

Tab A. Plea Agreement with Government - may have been submitted earlier, but we are not certain. Mr. Grijalva thought this agreement had to be in place before he filed his Appeal.

Tab B. Representation Agreement - Mr. Grijalva just executed this Agreement to have representation for this Petition.

4. Did the initial or addendum decision incorrectly decide any important facts or fail to consider any important facts that were presented to the judge? If so, describe what important facts were incorrectly decided or were not considered. Explain why that should change the result in your case.

Initially, Mr. Grijalva thought he would be charged with a felony, but ultimately the charge was reduced to a misdemeanor. Mr. Grijalva did receive notification that his appeal needed to be filed within 30 days, but with the criminal action in a state of flux, he simply did not realize that that 30 day filing obligation was still in effect. It was not a deliberate error, nor was it done for any nefarious purpose. It happened for the same reason Mr. Grijalva got involved with the original problem. He did not completely understand the system, and had no one to advise him on how he should proceed. (see 6 below)

5. Did the initial or addendum decision apply the wrong law or apply the law incorrectly? If so, what law should be applied and how? For example, did the decision fail to properly consider a specific law or regulation or another case that has been decided by a court or by the Board? If you answer "Yes," your explanation should refer to the specific law, regulation, or case. Explain how application of the right law should change the result in your case.

[no response]

6. Are there other reasons why the initial or addendum decision was wrong? If so, what are those reasons?

Mr. Grijalva did not think he could file until he knew whether he was being charged with a felony or a misdemeanor – the agency knows all these rules but an employee does not, and to say that ignorance is not an excuse is to forget that they do have a certain obligation to protect the employees, not just to rubber-stamp the government. In the interests of justice, the MSPB should hear Mr. Grijalva's Appeal.

Not to do so on a technicality – even one so clear as this – would be an obvious miscarriage of justice. By simply hearing the appeal, the MSPB will be following the spirit of the law, which was written to protect the interests of individuals who have fallen afoul of the government's many rules and regulations

7 What action {relief or remedy}do you want the Merit Systems Protection Board to order in this case? Why do you believe you are entitled to this relief or remedy?

By ordering that Mr. Grijalva's Appeal be heard, the MSPB will allow equitable closure to happen in this case.

/s/ Alex M. Grijalva
Signature of Appellant or
Non-Attorney Representative
Date Signed: 12/28/2007

Name of Appellant: Alex M. Grijalva
Represented by: Linda Rose Fessler, Esq
Address: 234 S Figueroa St, No 541
City, State and Zip Code: Los Angeles, CA 90012
Telephone Number:(213) 617-8684
Fax Number:(866) 492-1546
Email: LFess69012@aol.com

APPENDIX

Attachment A

YOU MUST COMPLETE THIS FORM AND SUBMIT IT WITH YOUR PETITION FOR REVIEW FORM.

CERTIFICATE OF SERVICE

I hereby CERTIFY that a copy of my Petition for Review and attachments was Sent by: (select all that apply)
☑ U.S. Mail, ☑ FAX, ☐ Personal delivery,
☐ Commercial overnight delivery, ☐ Other:
to each of the following on 12/28/2007
If there is more than one name listed below and you used different type of delivery, please write the type used next to each name.

Office of the Clerk of the Board
Type of Delivery: Fax (202) 653-7130
1615 M Street, NW.
5th Floor Mail Room
Washington, DC 20419

AGENCY REPRESENTATIVE (Name and Address)
Type of Delivery: U.S. Mail

Name:	Paul N. Janoff
Agency Name:	Department of Homeland
Office or Other	Security Coast Guard Island
Division:	MLCPAC
Number and	Building 54A
Street:	
City, State & Zip	Alameda, CA 94501
Code:	

OTHER PARTIES (IF THERE ARE ANY) Type of Delivery:
Name:
Agency Name:
Office or Other Division: Number and Street: City:
State and Zip Code:

/s/ Linda Rose Fessler
(Signature)

Attachment B

YOU MUST COMPLETE AND SIGN THIS FORM IF YOU ANSWERED "NO" TO QUESTION 1

MOTION TO ASK THE BOARD TO ACCEPT FILING AS TIMELY OR TO SET ASIDE THE DEADLINE

CASE NAME: v.
Docket Number:

I ask the Board to accept my document that appeared to be filed after the Board's deadline had passed. I ask the Board to allow me to submit my proof that the document was filed on time, or, I ask the Board to set aside (waive) the deadline for filing the document for the good cause (reason) shown below. I have included an exact and detailed description of the circumstances that caused the document to be filed late. I have included documents and/or other evidence that supports my request. I also have stated the reasons that I did not ask the Board, before the deadline, for more time to file the document.
(NOTE: If you are claiming that your health has

affected your ability to meet filing deadlines, you must show that you suffered from an illness that affected your ability to file on time. To establish that a late filing was caused by an illness, you must:

4. Identify the time period during which you suffered from the illness;
5. Submit medical or other evidence showing that you suffered from the illness during the time since the initial decision was issued; and,
6. Explain how the illness prevented you from filing your document on time or requesting an extension of time.

DECLARATION

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-3249

ALEX M. GRIJALVA,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

APPELLANT'S COMBINED OPENING BRIEF & APPENDIX (CORRECTED)

Petition for review of the Merit Systems Protection Board in SF0752070815-1-1.

LINDA ROSE FESSLER, ESQ. CA SBN 049417
LAW OFFICES OF LINDA ROSE FESSLER
234 S Figueroa St, Ste 541
LOS ANGELES CA 90012
(213) 617-8684; Fax (866) 492-1546
Email: LFess69012@aol.com

APPENDIX

TABLE OF CONTENTS

CERTIFICATE OF INTEREST
TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
I. STATEMENT OF RELATED CASES 1
II. JURISDICTIONAL STATEMENT 1
III. STATEMENT OF THE ISSUES 1
IV. STATEMENT OF THE CASE 1
V. STATEMENT OF THE FACTS 2
VI. SUMMARY OF THE ARGUMENT 3
VII. THE ARGUMENT 3
Standard of Review: 3
A. Board Policy Considerations Counsel Against Dismissals For Untimely Filing And Militate For Providing Employees With A Hearing On The Merits Of Their Appeals 4
B. If The Employee Gives A Reasonable Excuse For The Delay, Such Excuse Should Be Accepted By The Presiding Official, Absent A Showing Of Substantial Prejudice To The Agency Caused By The Delay In Filing 5
C. Any Doubt About Whether Good Cause Has Been Shown Should Be Resolved In Favor Of An Appellant. Good Cause Is An Elastic Concept [Which] Entitles The Employee To The Application Of The Broad Equitable Principles Of Justice And Good Conscience 6
VIII. CONCLUSION 9
PROOF OF SERVICE
CERTIFICATE OF COMPLIANCE
APPENDIX INDEX

APPENDIX

TABLE OF AUTHORITIES

Cases

Adams v. State, 123 P.3d 400, 2005 UT 62 9
Ceja v. United States, 710 F.2d 812 (Fed. Cir. 06/27/1983) 6, 7
Phillips v. United States Postal Service, 695 F.2d 1389 (Fed. Cir. 12/23/1982)..... 8
Pyles v. Merit Systems Protection Bd., 45 F.3d 411 (Fed. Cir. 01/10/1995) 6
Walls v. Merit Systems Protection Bd., 29 F.3d 1578 (Fed. Cir. 07/26/1994) 4, 5, 6
Young v. Department of Commerce, 737 F.2d 1029 (Fed. Cir. 06/28/1984) 8
Yuni v. Merit Systems Protection Board, 784 F.2d 381 (Fed. Cir. 02/19/1986)..... 7

APPENDIX

I. STATEMENT OF RELATED CASES

Appellant knows of no related cases filed in any Federal District Court, District Court of Appeals, or the Court of Appeals for the Federal Circuit.

II. JURISDICTIONAL STATEMENT

Appellant represents that the judgment of the U.S. Merit Systems Protection Board (hereinafter the "Board") appealed from is final.

III. STATEMENT OF THE ISSUES

1. Whether the Board abused its discretion in denying Appellant's Petition for Review of the decision issued by the administrative judge to dismiss Appellant's Appeal of a decision by the Department of Homeland Security, (hereinafter the "Agency") based on untimely filing of Appellant's Appeal to the administrative judge.

2. Whether the Board abused its discretion in denying Appellant's Petition for Review of the decision issued by the administrative judge based on procedural issues only, instead of on the merits of the case.

IV. STATEMENT OF THE CASE

Appellant filed an untimely *pro se* appeal of his dismissal for cause by the Agency, which appeal was dismissed on procedural grounds by Board Administrative Judge LuNell C. Anderson for its untimeliness. Through counsel, Appellant filed a Petition for Review of the Judge Anderson's decision, which the

Board summarily denied, citing the untimeliness of the initial appeal.

V. STATEMENT OF THE FACTS

On June 13, 2007, the Agency issued a letter of decision removing the Appellant, Alex M. Grijalva, for cause from his position as a Maintenance Mechanic (A35-36). On September 11, 2007, 48 days after the statutory deadline for filing an appeal, the Appellant filed his appeal of that decision to the Board without benefit of counsel (A14-20). His appeal was reviewed by Administrative Judge LuNell C. Anderson.

Because it appeared that the Appellant's petition for appeal was untimely filed, Judge Anderson issued an acknowledgment order on September 17, 2007, advising the Appellant of the Board's filing requirements and ordering him to respond within 10 days with evidence and/or argument showing that his appeal was timely filed or that good cause existed for the delay (A22-30).

On September 21, 2007, the Appellant responded to the acknowledgment order, again without benefit of counsel, but failed to address definitively the pertinent issues raised by Judge Anderson (A59).

Subsequently, on November 26, 2007, Judge Anderson dismissed Appellant's Appeal on procedural grounds as untimely filed (A2-8).

On December 28, 2007, Appellant filed a Petition for Review of Judge Anderson's decision, this time through the Law Offices of Linda Rose Fessler (A69-74).

On March 21, 2008, the Board denied Appellant's Petition for Review, issuing its final decision in the matter (A10-12).

On May 16, 2008, Appellant filed his Petition for

Review with the Court of Appeals for the Federal Circuit (A76).

VI. SUMMARY OF THE ARGUMENT

1. Appellant filed his original appeal with the Agency *pro se* (A14-20). He was simultaneously involved with a criminal action directly related to, and consequent to, his being removed for cause by the Agency (A37-55; 67). He believed – incorrectly – that the thirty-day time to file his appeal commenced with the decision on whether he would be charged with a felony or a misdemeanor (A59). This constitutes an inadvertent violation of the procedural rules, resulting in a miscarriage of justice. Even though he ought to have known, it is a miscarriage of justice to deny a legitimate appeal on this procedural grounds.

2. By denying the appeal on procedural grounds, the Board has made it impossible for the matter to be heard on its merits. Appellant is not addressing the merits of his original appeal; all Appellant wants is the chance for his appeal to be heard on its merits – for somebody other than the self-interested Agency to hear the facts.

VII. THE ARGUMENT

Standard of Review:

1. The appeal was wrongly decided based on the evidence already in the record;

2. There is new evidence, which was previously unavailable despite Appellant's due diligence, that supports a different outcome; or

3. Errors in the way the appeals proceeding was handled denied Appellant the opportunity to fairly present his case.

APPENDIX

A. Board Policy Considerations Counsel Against Dismissals For Untimely Filing And Militate For Providing Employees With A Hearing On The Merits Of Their Appeals

In *Walls v. Merit Systems Protection Bd., 29 F.3d 1578 (Fed. Cir. 07/26/1994)* this court said (at [22]):

> The Board has acknowledged that its "regulations include no specific criteria for determining when good cause has been shown for waiving the time limitation on the filing of an appeal." Alonzo v. Department of the Air Force, 4 M.S.P.R. 180, 184 (1980). Furthermore, the Board has also noted that **policy considerations counsel against dismissals for untimely filing and militate for providing employees with a hearing on the merits of their appeals**, id. at 183 (citing S. Rep. No. 969, 95th Cong., 2d Sess. 24, 51 (1978), reprinted in 1978 U.S.C.C.A.N. 2723, 2773), and that **"broad equitable principles of Justice and good conscience" should be applied in good cause determinations**, id. at 184. [emphasis added]
>
> *Walls v. Merit Systems Protection Bd., 29 F.3d 1578 (Fed. Cir. 07/26/1994)*

In the within case, Appellant was discharged for cause by the Agency (A35-36), and filed an untimely appeal to the Board (A14-20). The Board dismissed his appeal for the untimeliness (A10-12), so that Appellant did not have a hearing on the merits of his case. This runs directly counter to the Board's stated policy that "broad equitable principles of Justice and good conscience" should be applied in good cause de-

terminations."

B. If The Employee Gives A Reasonable Excuse For The Delay, Such Excuse Should Be Accepted By The Presiding Official, Absent A Showing Of Substantial Prejudice To The Agency Caused By The Delay In Filing.

The Appellant gave reasons for his late filing, specifically citing a related criminal case where he was awaiting a determination of whether he was facing a felony or a misdemeanor charge (A37-55; 67), and specifically stating that he thought the time for filing his appeal ran from the date of that determination (A59). Appellant was *pro se*, (and thus without benefit of counsel), facing a hugely life-altering event, and made a decision he thought was correct. The Appellant's decision was reinforced by a favorable unemployment benefits decision that seemed to support the merits of his case (A62-65). Despite this, the Board breached its own policy consideration that "...counsel[s] against dismissals for untimely filing and militate[s] for providing employees with a hearing on the merits of their appeals...(*Walls v. Merit Systems Protection Bd., 29 F.3d 1578 (Fed. Cir. 07/26/1994)*).

The Board further ignored its stated position that "..."broad equitable principles of Justice and good conscience" should be applied in good cause determinations.... "If the employee gives a reasonable excuse for the delay, such excuse should be accepted by the presiding official, absent a showing of substantial prejudice to the agency caused by the delay in filing."" (*Walls v. Merit Systems Protection Bd., 29 F.3d 1578 (Fed. Cir. 07/26/1994)*). Since the Agency was silent on the matter of "...substantial prejudice to the agency caused by the delay in filing," this court can

presume there was no prejudice to the Agency resulting from Appellant's late filing.

In *Walls*, this court concluded simply that "Because petitioner has shown good cause for his untimely filing and because the Agency has made no showing of substantial prejudice flowing from the...filing delay, we hold that the AJ abused his discretion by not waiving the filing deadline for good cause." (*Walls v. Merit Systems Protection Bd., 29 F.3d 1578 (Fed. Cir. 07/26/1994)*) Similarly, in *Pyles v. Merit Systems Protection Bd., 45 F.3d 411 (Fed. Cir. 01/10/1995)*, this court found that " [38] Because Pyles showed good cause for her untimely filing, and the OPM made no effort to show substantial prejudice flowing from the delay, we hold that the denial of the waiver was an abuse of discretion."

In the within case, Appellant presented reasons he clearly believed were sufficiently substantial to merit a waiver of the untimely filing, whereas the Agency made no effort to show substantial prejudice flowing from the delay. Appellant's case should, therefore, be heard on its merits, and not be dismissed on procedural grounds.

C. Any Doubt About Whether Good Cause Has Been Shown Should Be Resolved In Favor Of An Appellant. Good Cause Is An Elastic Concept [Which] Entitles The Employee To The Application Of The Broad Equitable Principles Of Justice And Good Conscience

In *Ceja v. United States, 710 F.2d 812 (Fed. Cir. 06/27/1983)* this court noted that "[21] Alonzo, et al. v. Department of the Air Force, et al., 80 FMSR para. 7032 (1980) is the seminal decision of the MSPB which delineates the factors which are to be consi-

dered in deciding whether the...time limit for appeal is to be waived." This court then further notes that the Alonzo decision states in part:

> [22] If the employee gives a reasonable excuse for the delay, **such excuse should be accepted by the presiding official, absent a showing of substantial prejudice to the agency caused by the delay in filing**. The appellant need not show an utter impossibility, but only that the delay was excusable in light of the particular facts and attending circumstances where diligence or ordinary prudence has been exercised.
>
> ...
>
> [24] Generally, we believe that in cases such as these, **any doubt about whether good cause has been shown should be resolved in favor of an appellant**. In determining whether the agency was unduly prejudiced by the delay, we have balanced the equities involved, weighing the difficulties of the agency against the benefit to the appellant. [emphasis added]
>
> *Ceja v. United States, 710 F.2d 812 (Fed. Cir. 06/27/1983)*

The foregoing statements seem to leave no doubt that the Board should have waived the late filing in the within case, and reviewed the case on its merits. In *Pfaehler v. Merit Systems Protection Board, 783 F.2d 187 (Fed. Cir. 02/10/1986)* this court once again addresses this issue by saying that "[27]... in keeping with Alonzo: "good cause is an elastic concept [which] entitles the employee to the application of the broad equitable principles of justice and good

conscience". 4 M.S.P.R. at 183-4."

In *Yuni v. Merit Systems Protection Board, 784 F.2d 381 (Fed. Cir. 02/19/1986)* this court said:

> [31] Once more we seek to apply the wisdom expressed by the MSPB in Alonzo v. Department of the Air Force, 4 M.S.P.R. 180, 183-84 (1980): "'good cause' is an elastic concept . . . [which] entitles the employee to the application of the broad equitable principles of justice and good conscience." In Ceja v. United States, 710 F.2d 812, 814 (Fed. Cir. 1983), this court quoted Alonzo with approval to the effect that any doubt as to whether good cause has been shown should be resolved in favor of an appellant, that an appellant need not show impossibility but only that the delay was excusable in light of the surrounding circumstances where ordinary prudence had been exercised, and that a reasonable excuse should be accepted by the presiding official absent proof of substantial prejudice to the agency.
> *Yuni v. Merit Systems Protection Board, 784 F.2d 381 (Fed. Cir. 02/19/1986)*

This court acknowledged that "[16] The statutory provisions for appeals to the board give the board broad discretion in handling appeals and controlling its own docket by requiring that appeals be processed in accordance with regulations prescribed by the board." *Phillips v. United States Postal Service, 695 F.2d 1389 (Fed. Cir. 12/23/1982).* But in *Young v. Department of Commerce, 737 F.2d 1029 (Fed. Cir. 06/28/1984)* said: " [23] Notwithstanding our deference to the M.S.P.B. under Phillips, we find here

that the excuses offered by petitioners are reasonable and find no showing of prejudice to the agency in the record. Under the circumstances of this case, we hold that the M.S.P.B. abused its discretion in not accepting the three appeals."

As in *Young* and *Yuni*, Appellant herein supplied the Board with "a reasonable excuse" in this case, and the Agency remained silent on the matter, declining to present "proof of substantial prejudice to the agency." Any doubt, therefore, should be decided in favor of the Appellant.

Although not a precedent for this Court, it is interesting to note that the Utah Supreme Court determined that "An analysis of what constitutes an exception in the "interests of justice" should involve examination of both the meritoriousness of the petitioner's claim and the reason for an untimely filing." *Adams v. State, 123 P.3d 400, 2005 UT 62.* Thus, the principle that merit trumps timeliness extends beyond the Federal circuit, and certainly should be applied to the within case.

VIII. CONCLUSION

Appellant was discharged for cause by the Agency, and simultaneously charged with criminal conduct related to that discharge. He saw these matters as related, and mistakenly believed he had 30 days following finalizing of the criminal charges to file his appeal of the discharge to the Board.

The Board dismissed his appeal as untimely, and subsequently denied his Petition for Review.

For all the reasons stated above, and in the interest of equity and justice, Appellant seeks a reversal of the Board's decision to dismiss his appeal for untimely filing, and that his appeal be remanded for

consideration on its merits.

DATED: August 12, 2008 **LAW OFFICES OF LINDA ROSE FESSLER**

/s/ Linda Rose Fessler
Linda Rose Fessler
Attorney for Alex M. Grijalva

APPENDIX

U.S. Department of Homeland Security
United States Coast Guard

Commanding Officer
Integrated Support Command San Pedro

1001 S Seaside Ave, Bldg 10
San Pedro, CA 90731
Staff Symbol: e
Phone: 310-732-7445
Fax: 310-732-7449
Email: Michael.A.Hudson@uscg.mil

12750
21 May 2007

MEMORANDUM

/s/ M.A. Hudson
From: M.A. Hudson, LCDR, USCG
CG ISC SAN PEDRO (c)

To: Mr. Alex M. Grijalva, Maintenance Mechanic, WG-4749-09

Subj: NOTICE OF PROPOSED REMOVAL

Ref: (a) COMDINST 12750.4 (series)
(b) 5 CFR 752
(c) 5 USC 7503

1. This is official notice that I propose to remove you from your position. of Maintenance Mechanic, WG-4749-09, at USCG Integrated Support Command San Pedro, and from Federal employment. This is a notice of proposed adverse action issued in

accordance with references (a), (b) and (c). In order to promote the efficiency of the service, it is proposed to remove you from the service any time after thirty (30) calendar days from the date you this notice. This proposed removal is based on the charge of providing prohibited objects and coordinating/aiding in the smuggling of prohibited objects to inmates at the Federal Correctional Institution, Terminal Island, San Pedro, CA in exchange for money. This action is being taken to promote the efficiency of the service. You will remain in an administrative leave status during this notice period, unless otherwise notified in writing. The specific facts supporting the charge are stated below:

Providing prohibited. objects, and coordinating/aiding in the smuggling of prohibited items to inmates at the Federal Correctional Institution, Terminal Island, San Pedro, CA, in exchange for money. In an affidavit signed on January 18, 2007 to the Coast Guard Investigative Services in an official investigation, you admitted on numerous occasions to purchasing and aiding in the smuggling of a variety of prohibited items for inmates at the Federal Correctional Institution, Terminal Island, San Pedro, California. You admitted that from the period of December 2005 to January 2007, you received funds from inmates' family members and associates to purchase and deliver prohibited items to the inmates. You admitted to helping the inmates smuggle the prohibited items into the Federal Correction Institution.

2. In making my decision to propose your removal, in addition to the above facts, I took into consideration the Douglas factors. In doing so, I considered

such factors as the .seriousness of your actions, the affect your misconduct has on the organization, your employment history, your length of service your attendance record, your performance record and your disciplinary record. I note that you have admitted to providing prohibited. items to inmates on numerous occasions and acknowledged that you knew what you were doing was wrong. Your actions resulted in a multi-agency investigation which brought discredit upon this command and the United States Coast Guard. Your actions are also being reviewed by the U.S. Attorney's office for violation of Title 18 USC 1791. In addition, your actions resulted in the elimination of the inmate labor program at ISC San Pedro. In proposing this action, I considered the fact that you have over 24 years of creditable Federal service and your performance ratings for the past three years have been at the Meets level. I also considered the fact that you have no prior disciplinary offenses. Your actions have caused me great concern and I have lost confidence in your judgment and your ability to carry out the duties of your position. To tolerate in any way your behavior, would be contrary to the good order and discipline of this command. Due to the nature and the seriousness of your actions, I have determined that proposing a lesser remedy would not be appropriate.

3. This proposal is made to promote the efficiency of the service and is necessary in order to maintain good order and discipline in our organization. This proposal is also consistent with the Guideline Schedule of Offenses and Remedies found in COMDTINST M12750.4, Civilian Personnel Actions: Discipline, Performance, Adverse Actions, Appeals and Grievances.

4. You have the right to reply to this notice orally and/or in writing and to submit affidavits and other evidence in support of your reply. Your reply, if any, must be made within ten (10) calendar days after the receipt of this notice and should be addressed to: CDR William Fox, Executive Officer, ISC San Pedro, 1001 S. Seaside Avenue Bldg #24, San Pedro, CA 90731. If you wish to make a personal reply, you many arrange an appointment by contacting Ms. Janet Pecarich at (310) 732-7403.

5. You may have an attorney or other person of your choice represent you in any proceeding concerning this proposed action. If you desire a representative, the individual must be designated in writing to the deciding official. This agency may disallow your choice of representative if a conflict of interest exists. You and your representative are entitled to review the materials relied upon to support this proposed action. You can arrange to review the materials by contacting LCDR Hudson at (310) 732-7445.

6. This is a proposal only. No final decision will be made until your reply is received and carefully considered, or until the reply period has passed should you not respond. Consideration will be given to any extension with a justifiable request. Full and impartial consideration will be given to any reply you submit before a final decision is made on this proposal. You will be notified in writing of the decision on this proposed action.

7. If you have any questions concerning procedural rights applicable to this proposal, you may contact Mr. Richard Lee, Command Staff Advisor,. at (510)

437-3952.

Copy: CG-12I
Mr. Richard Lee, Command Staff Advisor
CDR William Fox, Executive Officer

Please sign the receipt of acknowledgment below as evidence that you have received this letter. Your signature does not mean that you agree with the contents of the letter; nor by signing, are you forfeiting any of your rights cited above.

Receipt Acknowledged: /s/ Alex M. Grijalva
Date: May 21, 2007

TO: CDR William A. Fox
From: Alex Grijalva
Subject: Termination letter.

I received my proposed termination letter from LCDR M.A. Hudson yesterday morning. First, I'd like to say I don't know where he got the idea that I made any money off the inmates. They were getting paid .40 cents an hr. & also getting paid in postal stamps. This is an assumption on his part, there is no proof that I made a cent nor did I ever admit to it on my statement. Second, yes I purchased contraband for the inmates. I knew it was wrong. However, I never knew it was illegal or a crime. Noone in the shops have had formal training on how to handle inmates. There was a breifing once, when they first came on board. Supervisors were the only persons who attended. Also I never smuggled anything ever into the prison complex. I mean, how could I? I did bring it on board into the shop area, they took it from there. I never knew how they got stuff inside. I never admitted to that either. They would tell me they had prison guard friends. There was never anything illegal about what I purchased for these men. All over the counter products. Sir, money was never a motive for me. I'm very upset & angry that my reasons for what I did are not mentioned. This was on my statenment I'm going to take some time & explain. I've been on base for 12 years. I've had 3 major on the job related injuries & 3 surgeries to correct these injuries. During the time the inmates came on board I was preparing for my 3rd surgery which was a herniated neck disk brace fusement. This surgery happened on April 06 I returned to work in June with lite duty restrictions that still apply to this day. Lite duty was honored by my supervisor Daniel

Rangel for about 3 weeks.. Then he said he needed me out in the field to help with the inmates. He said he wanted me to train these guys to do my job. Not to do the work but to train them to do it So I did the best I could in doing just that. It wasn't long before I found myself on my knees working right along with these men. We began knocking out allot of work orders. Everyone was happy, however, the inmates became more demanding as far as requesting favors. I was very much depending on these men. They were doing my job! Favors as far as food started long before we started purchasing other products. Before I went into surgery we were, I mean the DC Shop personal/supervisor included were pitching in to buy the inmates Birthday Cakes & Ice Cream on their b-days.We would collect & recycle aluminum cans, plastics etc. & with the money buy food for a shop party. Inmates were always included. They did most of the cooking. Now, if this is such a crime why am I the only one being punished? I've seen others purchase food, soft drinks, chewing tobacco, for the inmates. I've seen supervisors eat prison food that was prepared by the prison. I've seen the EM Shop provide DVD rated "R" movies for the inmates during lunch periods & sports days. The inmates only get to watch rated "G" movies inside. Sir, what I'm saying is there was allot of different favors being done by just about everyone in the shops for these men. My disability to do my job properly weighed heavy on me, I was very dependent on the inmates to help me out. The more work we did the more demanding they became. I sorry for my part in this mess. I apologize!

I respectfully ask that reconsideration for my termination be granted. I have 24 good years with 4 branches of our Government. ARMY, NAVY, AIR

FORCE, COAST GUARD. I'm a 53 year old, hispanic male, Vietman Era Vet with just a few months before I quailify for retirement

Sincerely, Alex Grijalva

/s/ Alex M. Grijalva

5/22/07

APPENDIX

U.S. Department of Homeland Security
United States Coast Guard

Commanding Officer
Integrated Support Command San Pedro

1001 S Seaside Ave, Bldg 10
San Pedro, CA 90731
Staff Symbol: e
Phone: 310-732-7445
Fax: 310-732-7449
Email: Michael.A.Hudson@uscg.mil

12750
13 June 2007

MEMORANDUM

/s/ W.A. Fox

From: W.A. Fox, CDR, USCG
Executive Officer, ISC San Pedro

To: Mr. Alex M. Grijalva, Maintenance Mechanic, WG-4749-09

Subj: DECISION ON PROPOSED REMOVAL

Ref: (a) COMDINST 12750.4 (series)
(b) 5 CFR 752
(c) 5 USC 7503

1. In a letter to you dated May 21, 2007, the Engineering Officer, USCG Integrated Support Command San Pedro, proposed to remove you from your position of Maintenance Mechanic, WG-4749-09, at USCG Integrated Support Command San Pedro, no

earlier than thirty (30) calendar days from receipt of that notice. The proposal was based on your actions of providing prohibited objects to inmates at the Federal Correctional Institution, Terminal Island, San Pedro, CA in exchange for money. The reply period has now passed.

2. After carefully considering the information regarding your conduct and your written e-mail response provided to me on May 22, 2007, I find as follows:

I find that the evidence supports the charge of providing prohibited objects and coordinating/aiding in the smuggling of prohibited objects to inmates at the Federal Correctional Institution Terminal Island San Pedro, CA. I further find that the amount or money you may have profited, if any, was not significant enough to indicate a profit motive on your behalf. In an affidavit signed on January 18, 2007 to the Coast Guard Investigative Services in an official instigation, you admitted to on numerous occasions purchasing and aiding in the smuggling of a variety of unauthorized items for inmates at the Federal Correctional Institution, Terminal Island, San Pedro California. You admitted that from the period of December 2005 to January 2007, you received funds from inmates' family members and associates to purchase and deliver unauthorized items to the inmates. You admitted to helping the inmates smuggle the unauthorized items into the Federal Correctional Institution.

3. In making this decision, in addition to the above facts, I took into consideration the seriousness of this incident and the impact your misconduct has had on

Integrated Support Command San Pedro. I also considered such things as your employment history, your length of service, your attendance record, your performance record and your past disciplinary record.

4. Based on the above determinations,. I find that removal is the only appropriate remedy for your conduct. I have considered lesser forms of discipline, but the severity of your actions, their impact on ISC San Pedro's operations, potential disgrace to the Coast Guard, and my loss of confidence in your judgment indicate that a lesser remedy would not be appropriate.

5. You have the right to appeal this decision to the Merit Systems Protection Board (MSPB). An appeal must be forwarded either by personal delivery during normal business hours, by facsimile, by mail, or by commercial overnight delivery. If you file an appeal outside a time limit set by statue or regulations, you must file with the petition a motion for waiver of the time limit. The motion must contain evidence and argument showing good cause for the delay in filing or your appeal may be dismissed by the MSPB as untimely. Your appeal may be filed with the MSPB within thirty (30) calendar days beginning the day after the effective date of this action. Your petition for appeal should be addressed to the Western Regional Field Office, Merit Systems Protection Board, 750 Montgomery St, Suite 400, San Francisco, California 94104. Phone (415) 705-2935. A copy of the MSPB regulations and appeal form are enclosed.

6. If you believe this action was taken it whole or in part on the basis of prohibited discrimination due to

race, color, religion, national origin, handicap, or age, you may either file a timely complaint of discrimination, or file an appeal with MSPB, as previously described; however, you may only elect one avenue of redress. To file a complaint of discrimination in accordance with COMDTINST M12713.7 and 29 CFR 1614, you must contact an Equal Employment Opportunity counselor within forty-five (45) calendar days of the effective date of this action.

7. As an employee with 24 years federal service you may be eligible for a disability retirement. You may file an application for a disability retirement with the Office of Personnel Management within year from your date of separation Please contact Walter Misiorek at 202-475-5326 for additional information.

8. If you have any questions concerning procedural rights applicable to this decision, you may contact Mr. Richard Lee, Command Staff Advisor, at (510) 437-3952.

Encl: (1) Copy, MSPB regulations: SCR 1.200 - 1209
(2) MSPB Appeal Form: Optional Form 283
Copy: CG-121
Mr. Richard Lee, Command Staff Advisor

I acknowledge receipt of this letter.

Receipt Acknowledged: /s/ Alex M. Grijalva
Date: 6/13/2007

APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
PROBATION OFFICE
January 7, 2008

LORETTA S. MARTIN
CHIEF PROBATION OFFICER

800 U. S. COURTHOUSE
312 N. SPRING STREET
LOS ANGELES 90012-4708

Honorable Jeffrey W. Johnson
United States Magistrate Judge
United States Court House
Los Angeles, California 90012

Re: GRIJALVA, Alex M.
Docket No. CM-010174W

Dear Judge Johnson:

Because this case is a Class B Misdemeanor, the sentencing guidelines do not apply. Having considered the sentencing factors enumerated at 18 U.S.C. 3553(a), the Probation Officer respectfully recommends the following sentence.

It is ordered that the defendant shall pay to the United States a special assessment of $10, which is due immediately.

All fines are waived as it is found that the defendant does not have the ability to pay.

APPENDIX

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Alex M. Grijalva, is hereby placed on probation on the Single-Count Information for a term of six months under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the U. S. Probation Office and General Order 318; and
2. During the period of community supervision the defendant shall pay the special assessment in accordance with this judgment's orders pertaining to such payment.

The drug testing condition mandated by statute is suspended based on the Court's determination that the defendant poses a low risk of future substance abuse.

Justification

Pursuant to 18 U.S.C. § 3553(a) the court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

1. The nature and circumstances of the offense and the history and characteristics of the defendant;
2. The need for the sentence imposed –
   a. To reflect the seriousness of the offense; to promote respect for the law; and to provide just punishment for the offense;

b. To afford adequate deterrence to criminal conduct;
c. To protect the public from further crimes of the defendant; and
d. To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment the most effective manner.

3. The kinds of sentence available;
4. The guideline sentencing range;
5. Any pertinent policy statements issued by the Sentencing Commission;
6. The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
7. The need to provide restitution to any victims of the offense.

Before the Court is 53-year-old Alex M. Grijalva who plead guilty to one count of providing contraband to an inmate, a Class B Misdemeanor.

To his credit, Grijalva was forthcoming at the time of the presentence interview and has taken full responsibility for his actions. The risk of recidivism appears slight as the offense appears limited to the circumstances, i.e., Grijalva was unable to physically complete his work and agreed to purchase cigarettes and provide them to FCI-TI inmates, in exchange for the inmates completing Grijalva's work. Grijalva is no longer employed by the United States Coast Guard and therefore not in contact with inmates. Notwithstanding the instant offense, Grijalva has lead a productive lifestyle; he has no criminal history and

has a steady history of employment, having worked for as a building maintenance mechanic for the federal government for a total of 24 years, until his termination from the U.S. Coast Guard as a result of the instant offense. In light of the above factors, a sentence of six months probation is recommended. A fine has been waived as Grijalva does not have the ability to pay a fine.

Respectfully submitted,

LORETTA S. MARTIN
Chief U.S. Probation Officer

/s/ Lori Pascover
LORI PASCOVER
U.S. Probation Officer

Reviewed and Approved:

/s/ Susan Jones
SUSAN JONES
Supervisor

APPENDIX

From: Alex M. Grijalva Case No. 2174517 (UCFC)
To: J. Henley
Administrative Law Judge

Subject: Written Declaration

I was terminated on June 25, 2007 for giving inmates contraband (Prohibited Objects). First I would like to say that when this Investigation first began, I cooperated in every aspect. I was honest about what I had done to all investigators & authorities. However, when asked for union representation, I was denied. I was in this alone. I was very intimidated by everyone's questioning. I could not afford help from an attorney.

Second, I was not alone in this as far as giving the inmates contraband. Everyone in the DC Shop was giving these men prohibited objects. Including the DC Shop supervisor Daniel Rangel. Food, magazines are also prohibited objects. Mr. Rangel would often turn a blind eye to all that was going on. We would collect monies from shop members to buy cake & ice cream for inmates on their birthdays. We would also collect & recycle aluminum & plastics. With this monies we would have DC Shop parties & the inmates were always invited. They would do most of the food preparations. The inmates would also share there prison food with the military personnel as well as the civilians. Yes including Mr. Rangel. No-one else was punished in the DC Shop. No-one else was as honest as I & one other gentleman whom worked in the M & R Shop, P.O. Doland.

Third, the Electric Shop supervisor Chief Sierras also provided special favors for these men. He would

let them watch "R" rated movies in his shop during lunch & sport days. They are only allowed "G" rated movies inside the prison. He would let them store/ prepare food in the EM Shop. They would always prepare him a plate in exchange for his favors.

Fourth, I believe my punishment was much to harsh. My neuro-surgeon Dr Mahornar, 1505 Edgemont, 4th Floor L.A., Ca. 90027 (800-954-8000) said they're making excuses to get rid of you because of your limited disability. I believe I was singled out. I could continue to work & they denied me this opportunity "Racism/Discrimination". I had herniated disk neck surgery in April of 2006. I was placed on lite duty a few months before the surgery & still to this date I have the same limited restrictions. That's when the favors of food began for me. I became very dependent upon these men to help me do my job. There was no other motive for my giving these men contraband. Dr. Mahomar has placed me on retirement disability. My claim is still pending.

Fifth, as far as the felony charge goes. My newly appointed Public Defender Alan I. Rubin, 11755 Wilshire Blvd. 15th Floor LA, Ca. 90025 (310-473-6447) says what I did was nothing more than a "Minor Misdemeanor". That this matter shouldn't have gone this far. Because of my 24-1/2 year clean record the USCG could have taken other means of punishment/rehabilitation. That the U.S. prosecuting attorney Steven Arkow, 311 North Spring St.. L.A., Ca. 90012 (213-894-2434) can dismiss this charge or settle this matter out of court.

Sixth, the Equal Opportunity Commission will be consulted about these issues. At time of

the incident "injury" it had not been determined that it was an illness or disability.

I declare under penalty of perjury under the laws of the State of California that the forgoing is true & correct.

/s/ Alex M. Grijalva
9/18/2007

APPENDIX

INGLEWOOD OFFICE OF APPEALS
9800 South La Cienega Blvd. Ste 901
INGLEWOOD CA 90301
(310) 337-4302

ALEX MALDONADO GRIJALVA	Case No. 2114517 (UCFE)
SSN: xxxx-3760	Issue(s): 1256
Claimant-Appellant	
	Date Appeal Filed:
v	08/06/2007
	EDD: 0410
US COAST GUARD	BYB: 06/24/2007
Account No: 000-0000	
Employer	

Date and Place of Hearing(s):
(1) 09/18/2007 Long Beach

Parties appearing: Claimant, *Employer
* Indicates Party Appeared by Written Statement

DECISION

The decision in the above-captioned case appears on the following page(s).

The decision is final unless appealed within 20 calendar days from the date of mailing shown below. See the attached "Notice to Parties" for further information on how to file an appeal. If you are entitled to benefits and have a question regarding the payment of benefits, call EDD at 1-800-300-5616.

/s/ J. Henley
Henley, Administrative Law Judge

APPENDIX

Case No.: 2174517 Inglewood Office of Appeals
CLT/PET: Alex Grijalva AU: J. Henley
Parties Appearing: Claimant, Employer
Parties Appearing by Written Statement: Employer

ISSUE STATEMENT

The claimant appealed from a determination disqualifying the claimant for unemployment benefits under Unemployment Insurance Code section 1256. The issue in this case is. whether the claimant was discharged for misconduct connected with the most recent work.

STATEMENT OF FACTS

The claimant last worked for the employer for 12 years. He has worked for the federal government a total of 24 years. His last day worked was April 24, 2007, as a building maintenance mechanic. His terminating rate of pay was $24.86 per hour. His separation occurred for the reasons stated below.

The claimant worked at a 12 acre facility that was an island divided into two parts. One is a correctional facility, and the second half is the property of the U.S. Coast Guard. The claimant was responsible for carpentry, plumbing and painting. There was one employee for each task.

The claimant and other employees were informed that the Coast Guard had entered into an agreement with the correctional facility. The Coast Guard. would progressively introduce certain inmates in a work furlough program. When the

Coast Guard entered into the agreement with the prisons, the employees were supposed to be provided training and signs were to be posted regarding the rules. Signs were not posted and they were not provided training.

The claimant and other employees were opposed to this mingling. Initially, the inmates ate by themselves and the other employees ate by themselves. Subsequently, after about six months they became more integrated. They started eating together and bonding. They would all share food although that had been one of the specifics they were told not to do. They were not to share food with the inmates. However, supervisors also were sharing food with the inmates.

In 2005, the prison system introduced a prohibition against selling tobacco to inmates. This included chewing tobacco as well as cigarettes and cigars. The claimant became close with one specific inmate who asked him if he could buy him vitamins, specifically whey protein. The claimant agreed and started providing it although he was not very comfortable doing this.

The claimant underwent three surgeries in the recent years and was on light duty. He depended on the inmates to assist him to perform the duties of his job. At one point, the claimant spoke to his supervisor asking that he not work with the inmates anymore. Nevertheless, the claimant ended up working with most of the inmates.

An investigation by the Department of Justice and the Coast Guard Intelligence was initiated. The

claimant acknowledged that he had been providing tobacco and vitamins as well as food to the inmates. The claimant did not make any money on this venture. He did not smuggle anything into the prison. He was not told that he could not provide them with cigarettes and he was not told that he could not provide them with vitamins.

REASONS FOR DECISION

Unemployment benefits for federal civilian employees shall be paid in the same amount and subject to the same conditions as benefits would be payable under the unemployment program of the state to which wage credits have been assigned. (United States Code, title 5, section 8502(b).)

An individual is disqualified for benefits if he or she has been discharged for misconduct connected with his or her most recent work. (Unemployment insurance Code, section 1256.)

"Misconduct connected with the work" is a substantial breach by the claimant of an important duty or obligation owed the employer, wilful or wanton in character, and tending: to injure the employer. (Precedent Decision P-B-3, citing *Maywood Glass Co.* v. *Stewart* (1959) 170 Cal.App.2d 719.) On the other hand, mere inefficiency, unsatisfactory conduct, poor performance as the result of inability or incapacity, isolated instances of ordinary negligence or inadvertence, or good faith errors in judgment or discretion are not misconduct.

An employee shall substantially comply with all the directions of his or her employer concerning the service on which he or she is engaged, except whore such obedience is impossible or unlawful, or would impose new and unreasonable burdens upon the employee. (Labor Code, section 2856.)

The employer has the burden of proving misconduct. *(Prescod* v. *California Unemployment Insurance Appeals Board* (1976) 57 CalApp.3d 29.)

In the instant case, while the claimant breached the rule with regard to providing food for the inmates, since supervisors were also providing food to inmates, the rule was condoned by the employer. With regard to the other breach, the employer has not established by credible direct evidence that the claimant smuggled anything into the prison or that the claimant received a financial profit. Further, the employer has not established that the claimant was specifically informed of the prohibitions with regard to his interaction with inmates in the correctional institute. Accordingly, it is not found that the employer has met the burden of proof to establish that the claimant wilfully and knowingly breathed a reasonable duty or obligation that he owed to the employer. The determination reversed.

DECISION

The determination is reversed. The claimant is not disqualified from receiving unemployment benefits :under code section 1256. Benefits payable .provided he is otherwise eligible.